In the Supreme Court

OF THE

United States

OCTOBER TERM, 1965

No. ~~1199~~ 92

ROLAND CAMARA,
Appellant,

vs.

MUNICIPAL COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,
Appellee,

STATE OF CALIFORNIA,
Real Party in Interest.

On Appeal from the Judgment of the District Court of Appeal, State of California, First Appellate District

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the decision of the District Court of Appeal of the State of California, filed September 22, 1965, affirming the order of the Superior Court, which refused to prohibit the Municipal Court of the City and County of San Francisco from proceeding to try appellant on a criminal charge under ordinances which appellant charged violated the United States Constitution. Pending this disposition of this appeal, the District Court of Appeal has stayed the issuance of its remittitur and appellant has not

been brought to trial. The criminal charge is still pending in the Municipal Court but the decision of the District Court of Appeal will be conclusive in California on the question of its constitutional sufficiency.

This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court of Appeal is reported in 237 Adv. Cal. App. 136, 46 Cal. Rptr. 585 (1965), and is reproduced in Appendix A hereto. The order of the Superior Court denying the writ of prohibition is unreported and is reproduced in Appendix B hereto.

JURISDICTION

The order of the District Court of Appeal was filed on September 22, 1965. A timely petition for hearing before the Supreme Court of California was filed on October 28, 1965, and denied on November 16, 1965, with Justices Peters and Peek voting for a hearing. Notice of appeal was filed in the District Court of Appeal on December 20, 1965. Pursuant to Rule 13 of the Rules of the Supreme Court of the United States, the District Court of Appeal enlarged the time for appellant to docket his case to and including March 21, 1966.

The jurisdiction of the Supreme Court of the United States to review the decision below is conferred by Title 28, United States Code, Section 1257 (2).

STATUTES INVOLVED

Sections 503 and 507 of the San Francisco Municipal Housing Code are reproduced in Appendix C hereto.

QUESTIONS PRESENTED

I

Whether Section 503 of the Housing Code of the City and County of San Francisco, authorizing City employees to inspect private dwellings such as appellant's without warrant or probable cause for such inspections, and Section 507 of the Housing Code making refusal of such inspections a crime, are unconstitutional as authorizing unreasonable searches in violation of the Fourth and Fourteenth Amendments.

II

Whether Sections 503 and 507 of the Housing Code violate the First, Fourth, Fifth, Ninth and Fourteenth Amendments by allowing a search for evidence without warrant, arrest or emergency.

STATEMENT

Section 503 of the San Francisco Municipal Housing Code (Appendix C) authorizes city employees in the performance of their duties at reasonable times

to enter any building, structure or premises in San Francisco. Section 507 (Appendix C) makes it a criminal act to resist or oppose any provision of the Housing Code. Neither a warrant nor probable cause is necessary to allow a city employee to demand entry into one's home under Section 503. And if a resident refuses entry to the city employee into his home, the resident faces a criminal charge under Section 507 despite the absence of either a warrant or probable cause.

Appellant is charged in the Municipal Court with a misdemeanor on the basis of a written complaint that on November 22, 1963, he violated Section 507 by refusing a public health inspector entry into his dwelling for the purpose of making an inspection under the provisions of Section 503. (C.T. 7-8.)

Appellant applied for a writ of prohibition in the Superior Court and in doing so raised the constitutional issues involved in this appeal. (C.T. 6, 15-21.) An alternative writ of prohibition was issued requiring the Municipal Court to show cause why the prosecution should not be prohibited. (C.T. 21-22.) The issues raised by this appeal were argued orally at the hearing for the permanent writ of prohibition. (R.T. 2 et seq.) The application was decided adversely to appellant by the trial Court. The permanent writ was denied and the alternative writ was dissolved on the express ground that section 503 was not unconstitutional. (Appendix B; C.T. 37.) An appeal from the order of the trial Court was taken to the District Court of Appeal. The latter Court affirmed the deci-

sion of the Superior Court and in doing so expressly ruled that the ordinances involved did not violate the Fourteenth or Fourth Amendments. (Appendix A.) A petition for a hearing before the Supreme Court of California, raising these constitutional issues, was denied, with two Justices dissenting.[1]

On November 6, 1963, Inspector Nall of the Division of Housing Inspection of the Department of Public Health of San Francisco entered the premises at 225 Jones Street, an apartment house. The purpose of his presence was to make a routine annual inspection of apartment houses for the purposes of licensing and issuing a permit of occupancy.[2] Nall learned that appellant leased the store on the ground floor of the building and lived in the rear. Nall questioned appellant, who readily admitted such occupancy. However, appellant declined to allow Nall to inspect the residence portion of the premises. Nall did not have a warrant or written complaint. (C.T. 3-4, 25-26.)

Nall returned to the premises on November 8, 1965, and appellant again declined to allow him entry to inspect. (C.T. 26.)

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[1]Appellant had previously filed a demurrer to the complaint on the sole ground that the pertinent provisions of the Municipal Housing Code were unconstitutional. (C.T. 10.) The demurrer was overruled by the Municipal Court and appellant was required to enter his plea. The trial of the case is awaiting the outcome of this proceeding and it is conceded that if Section 503 of the Housing Code is not unconstitutional, appellant has no defense. (App. A.)

[2]These facts are those pleaded in the Petition for Writ of Prohibition (C.T. 3 et seq.) and the Answer to the petition (C.T. 24 et seq.). Only those facts admitted by Appellee (either expressly or by failure to deny) or alleged by Appellee are set forth in this Statement.

On November 22, 1963, Nall returned to the premises with Inspector John M. Reid. They did not have a warrant or written complaint. Reid told appellant that it was the responsibility of the Department of Public Health to inspect apartment houses annually for the purposes of licensing and issuing occupancy permits. He also informed appellant that the building where appellant lived could not have a dwelling on the ground floor and so it was illegal for appellant to occupy the ground floor as a residence. Reid again requested permission to inspect appellant's dwelling and appellant again declined to give permission to enter. (C.T. 4, 26-27.)

The inspectors did not have a warrant or written complaint on any of these occasions. At all times appellant readily admitted that he resided on the ground floor. No reason for inspecting appellant's residence was given other than his occupancy, which appellant admitted. No emergency was involved. There was ample time between November 6th and November 22nd to obtain a search warrant (if the situation required it) or to serve an eviction notice (if the law required it).[3] But no; the inspectors demanded the right to enter and search.

Appellant was arrested on December 3, 1963, before any written complaint was filed. Finally on December 10, 1963, a complaint was filed (C.T. 7-8) charging a violation of Section 507 because of appellant's refusal

[3]Whether or not appellant's residence was in fact legal for occupancy is of no relevance here since, if it was illegal to occupy the ground floor as a residence (Answer, C.T. 24-25), nothing in the interior of appellant's apartment could change that fact.

on November 22, 1963, to allow an inspection of his home as authorized by Section 503.

THE QUESTIONS ARE SUBSTANTIAL

The questions in this case present the important constitutional issue of whether a man may be made a criminal for declining to allow an invasion of his home in the absence of a search warrant or probable cause, or even an emergency requiring immediate entry. An ordinance which sanctions searches under these circumstances—along with penalties for refusal—violates the protections granted against unreasonable searches and seizures under the Fourteenth and Fourth Amendments to the United States Constitution and has further implications impinging upon the rights reserved to the people under the First, Fifth and Ninth Amendments.

Although similar issues have been presented to this Court on at least two occasions (*Frank v. Maryland*, 359 U.S. 360 (1959); *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960), neither decision may be considered dispositive of the basic issues or of the case now brought before this Court. First, later decisions of this Court show that *Frank v. Maryland* is inconsistent with the freedoms sought to be protected by the Fourth Amendment. The improper restrictions of that decision on our constitutional protections should be corrected. Second, the decision below goes beyond the *Frank* case in curtailing the guarantees of the Fourteenth Amendment.

1. The decision in *Frank v. Maryland,* 359 U.S. 360 (1959), may not be considered final authority to determine the issue before the Court. In *Frank* the Court upheld a city ordinance which allowed a health inspector to search one's dwelling without a warrant upon probable cause to suspect a nuisance existed. The Court split 4-1-4 in upholding the conviction for refusing entry to the health inspector.

The main opinion of the *Frank* decision ruled that the thrust of the Fourth Amendment prohibiting unreasonable searches and seizures was directed toward implementing the provisions of the Fifth Amendment prohibiting self-incrimination in a criminal case. Therefore, since the attempted search by the health inspector was not a criminal matter, the protections of the Fourth Amendment as applicable to the States through the Fourteenth Amendment were not available. 359 U.S. at 365-66.

This restriction of the Fourth Amendment is hardly reconcilable with earlier pronouncements in this Court. In *Boyd v. United States,* 116 U.S. 616, 630 (1886), for example, the Court stated that the protections against unreasonable searches and seizures "apply to *all* invasions on the part of government and its employees of the sanctity of a man's home and the privacies of life." In *Federal Trade Comm'n v. American Tobacco Co.,* 264 U.S. 298, 307 (1924), the Court carefully narrowed the investigating scope of a federal regulatory statute in order to avoid the violation of the Fourth Amendment. The Court in *Agnello v. v. Unitcd States,* 269 U.S. 20, 32 (1925), stated: "The

search of a private dwelling without a warrant is *in itself* unreasonable and abhorrent to our laws." (Emphasis added in each case.)[4]

When the *Frank* issue arose before this Court once again in *Ohio ex rel. Eaton v. Price,* 364 U.S. 263 (1960), in which a conviction was affirmed by an equally divided Court, four members of this Court expressed an unwillingness to be reconciled to *Frank* and viewed it as " 'the dubious pronouncement of a gravely divided Court.' " The *Frank* case was likened to " 'A single decision by a closely divided court, unsupported by the confirmation of time, (which) cannot check' the course of adjudication here." Id. at 269 (Brennan, J.).

This dubiousness concerning *Frank* as a constitutional standard is well justified by later decisions in this Court. In *Marcus v. Property Search Warrant,* 367 U.S. 717, 724-29 (1961), it was pointed out that the illicit practices to be suppressed by the Fourth Amendment were not only the collection of evidence to be used to incriminate but also the suppression of public expression—a ground independent of the Fifth Amendment. In *Mapp v. Ohio,* 367 U.S. 643, 657 (1961), the Court remarked that the purpose of both the Fourth and Fifth Amendments, "complementary to, although not dependent upon, that of the other", is " 'to maintain inviolate large areas of personal privacy.' " Furthermore, in *Stanford v. Texas,* 379 U.S. 476 (1965), the Court once again reviewed the ante-

[4]See also *Nueslein v. District of Columbia,* 115 F.2d 690, 692-93 (D.C. Cir. 1940), for an early discussion of the distinctions between the Fourth and Fifth Amendments.

cedents and application of the Fourth Amendment (as applied through the Fourteenth Amendment) and reaffirmed that its broad purpose was to assure that the people of this Nation are "'secure in their persons, houses, paper and effects.'" (379 U.S. at 481.) The Court did not limit this security to criminal matters only.[5]

The unsettled position of this issue in the Supreme Court allows attention to be drawn to the decision of the Court of Appeals of the District of Columbia in *District of Columbia v. Little,* 178 Fed. 2d 13 (1949), affirmed on other grounds, 339 U.S. 1. That case squarely rejected the contention that while a search to find criminal evidence must abide by the constitutional protections other searches are immune (*Id.* at 17):

> "To say that a man suspected of a crime has a right to protection against search of his home, without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity."

The Court noted that the Fourth Amendment was a restriction of power, not a grant of power. The Fourth Amendment provides the only means by which the government can invade a person's home, that is, by means of a search warrant or without one at times when there is no opportunity to obtain one and an

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[5]The Court in *Stanford* pointed out the abhorrence of writs of assistance anteceding the writing of our Constitution. Housing Code Section 503 provides a statutory writ of assistance. Reference should also be made to *Griswold v. Connecticut,* 381 U.S. 475, 14 L.Ed.2d 510 (1965), in which the Court gave constitutional protection to another aspect of the rights of security and privacy.

emergency requires immediate entry. Other searches are "unreasonable" and not authorized by the Constitution.

Two state Court decisions (besides the *Eaton* case and the instant case) have reached results differing from the *Little* case. *Givner v. State,* 210 Md. 484, 124 Atl. 2d 764 (1956); *St. Louis v. Evans,* 337 S.W. 2d 948 (Mo. 1960). *Givner* concerns the very practice upheld in the *Frank* case and is erroneous for the same reasons that *Frank* must be overruled. The *Eaton* and *Evans* cases go beyond *Frank*—by upholding ordinances that did not even require probable cause—but rely on *Frank* for authority.[6] These cases were decided before the decisions of this Court in *Marcus, Mapp,* and *Stanford* rejecting the narrow interpretation of the Fourth Amendment as espoused by *Frank.* These state cases are dangerous shoals in the sea of constitutional protection.

The *Frank* decision was a 4-1-4 case. The four dissenters have expressed in the later *Eaton* case that they are not reconciled to the *Frank* case. The *Frank* case depends on a restrictive interpretation of the Fourth Amendment which is not supported by earlier decisions and which has been repudiated by later ones. In view of the unsettled position of the Court on the important issue of constitutional protection here presented, the question in this case is a substantial one.

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[6]It should also be noted that in the *Evans* case the defendants were not occupants of the portion of the premises which the inspectors sought to enter. Consequently, the decision cannot be persuasive as to the issue now before this Court.

2. Even if the *Frank* case were considered settled, it would not be authority for the case at hand because the governmental invasion of the home sanctioned in this case is greater than that sanctioned in *Frank*. The ordinance in the *Frank* case contained a requirement of probable cause before a search could be made, and Justice Whittaker in concurring with the main opinion stated clearly that the ground for his concurrence was that the evidence showed probable cause of a health hazard as a support for the search. 359 U.S. at 373-74.

In the instant case the applicable ordinance, section 503, does not contain a requirement that the inspector have probable cause before he searches the premises. Hence even the smallest of protection for the resident is eliminated from the subject ordinance. Furthermore, on the facts there was no probable cause to support a search in this case. The investigation in this case was not to discover some undetermined health hazard. The investigation was to determine whether the ground floor of a particular apartment house was properly occupied. The health inspectors believed it was zoned for commercial occupancy. Appellant *admitted* to the inspectors that he was residing in the portion of the building which they believed was zoned for commercial use only. Hence the insistence of the inspectors to search the premises was not for the purpose of determining whether there was an emergency hazard or even whether the law was being violated, but was only a gratuitous desire to rigorously assert their privilege under Section 503. Certainly a *majority* of the Court in *Frank* would not have sanc-

tioned such an invasion of privacy—which served no public purpose.

3. It is avoiding the issue to justify a search under these circumstances without a warrant by referring to the necessity of officials to secure the public health in urban areas. Crime itself constitutes a hazard in urban areas and yet search warrants are required. As Justice Douglas stated in *Frank v. Maryland,* 359 U.S. 360, 382 (1959) (dissent):

> "One invasion of privacy by an official of government can be as oppressive as another. Health inspections are important. But they are hardly more important than the search for narcotic peddlers, rapists, kidnappers, murderers, and other criminal elements. * * *"

The privacy of one's home is given constitutional protection even in the face of the need for society to prevent the violation of law. The warrant issued by a magistrate is used "so that an objective mind might weigh the need to invade that privacy in order to enforce the law." *McDonald v. United States,* 335 U.S. 451, 455 (1948); *Johnson v. United States,* 333 U.S. 10, 13-14 (1948). This protection must remain whether criminal laws or public health ordinances are involved. The administration of either type of law is subject to abuse. Indeed, a ruling such as the *Frank* case provides an easy means whereby criminal law enforcement agencies may circumvent the requirement of a search warrant.[7]

[7]Instances of abuse of administrative searches, including the subversion of constitutional protections against illegal police activity through the cooperation of administrators and the police, are presented in several sources: E.g., *State v. Pettiford,* 28 U.S.

In conclusion, it is submitted that the decision in *Frank v. Maryland* can no longer—if it ever was—be considered dispositive of the issue before us. But that decision has succeeded in misleading several state courts of last resort and has left unwarranted authority in government agencies to violate the privacy of homes. The decision below, by upholding an ordinance which allows the search of one's home by a public official without probable cause or without a warrant even in the absence of an emergency, sanctions an unreasonable search of our homes in violation of the Fourteenth and Fourth Amendments. Certainly this raises a substantial federal question of great general importance.

March, 1966.

Respectfully submitted,

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Law Week 2286 (Dec. 22, 1959); Reich, "Midnight Welfare Searches and the Social Security Act," 72 Yale L.J. 1374 (1963); Lassen, *The History and Development of the Fourth Amendment to the United States Constitution*, 51 et seq. (1937); Comment, "State Health Inspections," 44 Minn. L. Rev. 513 (1960); Note, 25 Mo. L. Rev. 79 (1960).

(Appendices A, B and C Follow)